



No. 108, Original

In The

Supreme Court of the United States
October Term, 1994

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

**UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER**

**BRIEF OF THE STATE OF WYOMING
IN RESPONSE TO EXCEPTIONS OF THE
STATE OF NEBRASKA AND
THE UNITED STATES TO THE THIRD INTERIM
REPORT OF THE SPECIAL MASTER**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iv
I. JURISDICTION	1
II. INTRODUCTION	1
III. STATEMENT OF THE CASE	2
A. COURSE OF PROCEEDINGS	2
B. STATEMENT OF FACTS	5
IV. SUMMARY OF THE ARGUMENT	9
V. ARGUMENT	12
A. WYOMING'S FOURTH CROSS-CLAIM IS JUSTICIALE IN THIS CASE BECAUSE IT SEEKS TO REDRESS UNLAWFUL AND WASTEFUL BUREAU OPERATIONS THAT DIRECTLY AFFECT THE EQUITABLE APPORTIONMENT	12
1. <i>The Distribution of Storage Water in Accordance with Federal Reclamation Law and Existing Contracts was an Essential Predicate of the 1945 Equitable Apportionment</i>	13
2. <i>The United States and Nebraska have Introduced the Operation of the Federal Storage Projects as a Central Issue in the Case</i>	15

3. <i>Wyoming's Fourth Cross-Claim is not Precluded by Either the 1945 Opinion or the 1993 Opinion</i>	17
B. <i>IN ITS FOURTH CROSS-CLAIM, WYOMING IS ASSERTING ITS OWN SOVEREIGN INTEREST AS A STATE AND REPRESENTING ITS COLLECTIVE WATER USERS AS PARENTS PATRIAE</i>	22
C. <i>THIS IS THE ONLY FORUM IN WHICH TO LITIGATE ISSUES CONCERNING THE EQUITABLE APPORTIONMENT OF THE NORTH PLATTE, INCLUDING RELATED QUESTIONS ABOUT THE BUREAU OF RECLAMATION'S COMPLIANCE WITH FEDERAL LAW</i>	25
VI. CONCLUSION	30

TABLE OF AUTHORITIES

CASES

<i>Arizona v. California,</i> 373 U.S. 546 (1963), <i>decree entered</i> 326 U.S. 340 (1964)	30
<i>California v. Nevada,</i> 447 U.S. 125 (1980)	29
<i>Christopoulos v. United States,</i> No. C86-0370B (D. Wyo., <i>complaint</i> <i>dismissed without prejudice</i> August 31, 1990) . .	27
<i>Goshen Irrigation District v. United States,</i> No. C89-0161J (D. Wyo., <i>complaint filed</i> June 23, 1989)	25, 27, 28, 29
<i>Kansas v. Colorado,</i> 185 U.S. 125 (1902)	23
<i>Kansas v. Colorado,</i> 206 U.S. 46 (1907)	23
<i>Nebraska v. Wyoming,</i> 295 U.S. 40 (1935).	1, 24
<i>Nebraska v. Wyoming,</i> 304 U.S. 545 (1938)	1
<i>Nebraska v. Wyoming,</i> 325 U.S. 589 (1945)	<i>passim</i>
<i>Nebraska v. Wyoming,</i> 113 S.Ct. 1689 (1993)	3, 4, 14, 16, 20

<i>New Jersey v. New York,</i> 345 U.S. 369 (1953)	23, 24
<i>State of Wyoming and Goshen Irrigation District v. United States, No. C89-0286J</i> (D. Wyo., complaint filed October 6, 1989)	27
<i>United States v. Nevada,</i> 411 U.S. 534 (1973)	23, 29
<i>Wyoming v. Colorado,</i> 286 U.S. 494 (1932)	23
<i>Wyoming v. Oklahoma,</i> 112 S.Ct. 789 (1992)	24

CONSTITUTIONS AND STATUTES

U.S. Const. Art. III, § 2, cl. 2	1
Judiciary Act, 28 U.S.C. § 1251(a) (1988)	1, 30
Judiciary Act, 28 U.S.C. § 1251(b)(2) (1988)	30
Reclamation Act of 1902, 43 U.S.C. § 372 (1988)	6, 8, 21
Reclamation Reform Act of 1982, 43 U.S.C. § 390jj (1988)	6, 8
Warren Act, 43 U.S.C. § 523 (1988)	4, 6, 22, 25

I. JURISDICTION

The United States and the States of Wyoming, Colorado and Nebraska are before the Court in its original and exclusive jurisdiction over controversies between states. U.S. Const. Art. III, § 2, cl. 2; 28 U.S.C. § 1251(a) (1988). The Court's jurisdiction over the United States was established when the United States intervened in the case.¹ *Nebraska v. Wyoming*, 304 U.S. 545 (1938). Since the United States intervened, it has participated fully to assert its interest and to protect its reservoirs and irrigation systems in both *Nebraska v. Wyoming I*² and in the current proceedings. Thus, the Court has already exercised jurisdiction over the United States and over issues concerning the operation of the federal reservoirs and irrigation systems in this controversy between Nebraska and Wyoming.

II. INTRODUCTION

The Court, through a series of decisions since 1986, has agreed to hear Nebraska's and Wyoming's claims to enforce the existing equitable apportionment of the

1. Wyoming initially moved to dismiss Nebraska's complaint on the ground that the United States was an indispensable party which was immune from joinder in the suit. The Court found that the United States was not a necessary party but was a Wyoming appropriator adequately represented by Wyoming. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). However, the United States subsequently subjected itself to the Court's jurisdiction when it intervened to claim ownership of all unappropriated water and to protect its water rights for the North Platte and Kendrick Reclamation Projects.
2. The litigation that resulted in the opinion and decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945) will be referred to as *Nebraska v. Wyoming I*.

North Platte River and, if necessary, to modify the North Platte Decree to give effect to that apportionment. Wyoming's Fourth Cross-Claim alleges that the United States Bureau of Reclamation (the "Bureau") has frustrated the Court's equitable apportionment of the North Platte River by the manner in which it has operated various federal storage projects and administered natural flow and storage water deliveries under those projects. Wyoming asks for injunctive relief to make the United States accountable for its actions that alter the equitable apportionment. The Special Master, recognizing the importance of the federal storage water to the North Platte River apportionment, recommends that the Court accept Wyoming's Fourth Cross-Claim. In this brief Wyoming responds to the exceptions of both Nebraska and the United States to the recommendation that the Fourth Cross-Claim be accepted.

III. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Relevant portions of the proceedings leading to the motions for leave to amend pleadings now before the Court are summarized in earlier briefs. Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 1-2 (Docket No. 624); Wyoming Brief in Support of Exceptions to the Third Interim Report of the Special Master at 2-6 (November 25, 1994); Nebraska's Brief in Support of Exceptions to the Third Interim Report of the Special Master at 2-7 (November 22, 1994); Brief for the United

States in Support of Exception (November, 1994) at 1-2.³ Wyoming does not recount all of the relevant proceedings here but supplements those previous statements to explain how operation of the federal reclamation projects and allegations of injury to those projects have already become major issues in this case.

One of the issues addressed in the Court's 1993 opinion was whether Nebraska and the United States had come forward with sufficient facts to avoid summary judgment on the claims involving Wyoming's proposed Deer Creek Reservoir. *Nebraska v. Wyoming*, 113 S.Ct. 1689, 1699-1700 (1993). The United States argued that affidavits presented by the United States and by Nebraska had shown that Wyoming's proposed Deer Creek Reservoir would deplete the "water supply of the federal reservoirs and the Inland Lakes" and that such "evidence, standing alone, [was] sufficient to support the Special Master's denial of summary judgment." Brief for the United States Opposing Exceptions at 32-33 (August, 1992) (Docket No. 503); see also Nebraska's Response to Wyoming's, Colorado's, and Basin Electric's Exceptions to the Special Master's First and Second Interim Reports at 83-86 (Docket No. 501). The Special Master's recommendation to deny Wyoming's motions for summary judgment was based on his conclusion that Nebraska's Affidavit of H. Lee Becker had raised a genuine issue of material fact as to whether Wyoming's proposed Deer Creek Reservoir would injure the federal storage projects. First Interim Report at 30-31 (Docket No. 140); Second Interim Report at 75-77 (Docket No.

3. Nebraska's Brief in Support of Exceptions to the Third Interim Report of the Special Master will be cited herein as "Nebraska Brief." The Brief for the United States in Support of Exception will be cited as "U.S. Brief."

463). In adopting the Special Master's recommendation to deny summary judgment, the Court relied on the Becker Affidavit and on the United States' Affidavit of David G. Wilde. The Court specifically noted that the Becker Affidavit had concluded "that the [proposed Deer Creek] [P]roject would cause reductions in the average year-end carryover storage of federal reservoirs on the North Platte and that '[s]uch reductions . . . could limit diversions in the [pivotal] reach in a series of dry years.'" *Nebraska v. Wyoming*, 113 S.Ct. at 1699. The Court also noted that the Wilde Affidavit had concluded that "Deer Creek [Reservoir] would 'substantially impact federal projects during an extended dry period,' . . ." *Id.* at 1700. The Court's 1993 opinion thus identified potential injury to the federal projects as a key element of Nebraska's claims of injury to its equitable apportionment.

Wyoming's First and Fourth Cross-Claims are the direct result of the Court's recognition that the operation of the United States' storage facilities and delivery systems are a central focus of Nebraska's and the United States' claims against Wyoming. Wyoming's First Cross-Claim asks the Court to make the United States accountable for delivery of water in excess of beneficial use requirements. Wyoming's Fourth Cross-Claim asks that the federal storage projects be required to comply with the beneficial use standard that is part of federal law and part of contracts for the delivery of storage water written under federal law. The Fourth Cross-Claim additionally asserts that the United States has violated the Warren Act, 43 U.S.C. § 523 (1988) and thereby changed the established storage allocation system on which the equitable apportionment was based. Because the Special Master recommends that the Court deny Wyoming's First Cross-Claim and accept Wyoming's Fourth Cross-Claim, the two cross-claims have

been addressed separately in the parties' exceptions. Nebraska's exception notes an apparent inconsistency in the Special Master's treatment of those two cross-claims. However, if there is an inconsistency it results from the Special Master's failure to appreciate that the cogent reasons that support his recommendation to accept the Fourth Cross-Claim apply with equal force to the First Cross-Claim.

B. STATEMENT OF FACTS

The Special Master, citing Special Master Doherty's report, based his recommendation to accept Wyoming's Fourth Cross-Claim in part on the fact "that the availability of storage water from federal reservoirs was part of the calculus for the final equitable apportionment of natural flow under the decree." Third Interim Report at 69; *see also* Doherty Report at 156; *Nebraska v. Wyoming*, 325 U.S. at 645. In *Nebraska v. Wyoming I*, the Court found that storage water provided more than one-half the supply available to the canals in the pivotal Guernsey Dam to Tri-State Dam reach of the North Platte River. Doherty Report at 71, Table IV; *Nebraska v. Wyoming*, 325 U.S. at 605; Third Interim Report at 62. In 1945, 90% of the lands in Nebraska and Wyoming receiving water from the pivotal reach had contracts for storage water to supplement their rights to natural flow. *Nebraska v. Wyoming*, 325 U.S. at 605. With the completion of Glendo Reservoir in the late 1950's, approximately 97% of the lands served from the pivotal reach now have permanent storage water contracts. Because storage water is a crucial element of the water supply in the pivotal reach, Wyoming's Fourth Cross-Claim specifically questions whether the federal storage contracts

are administered and enforced according to Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 372 (1988), the Reclamation Reform Act of 1982, 43 U.S.C. § 390jj (1988) and the Warren Act, 43 U.S.C. § 523 (1988).⁴ Because of the direct relationship between the administration of federal storage contracts and the apportionment of natural flow, the injunctive relief sought in Wyoming's Fourth Cross-Claim is a matter of equitable apportionment and not a matter of enforcing private contracts.

Almost all of the natural flow and storage water in the pivotal reach must first pass through Glendo and Guernsey Reservoirs which lie at the upstream end of the pivotal reach. That fact has been recognized throughout these proceedings and in the Decree. Decree, Paragraph IV. The fact that the United States physically controls flows into the pivotal reach, as well as the fact that the United States and Nebraska have focused attention on the federal storage system in their claims of injury against Wyoming, prompted Wyoming to conduct discovery concerning the storage allocation and delivery system. Through discovery it appears that the United States participates in, and in fact is responsible for waste and over-diversion for Nebraska lands that are the subjects of Wyoming's First Counterclaim and First Cross-Claim. Wyoming is particularly concerned about the Bureau's practice of bypassing natural flow and releasing storage water *on demand* to the canals in the pivotal reach without regard to how the water is used. United States Response to Wyoming's Sixth Set of Interrogatories at 22-24, Nos. 30(c) through 30(f)

4. Wyoming's Brief in Support of its Motion for Leave to File Amended Pleadings (Docket No. 624) describes the relationship of storage water to the equitable apportionment of natural flow in the 1945 Decree. *See also*, Third Interim Report at 69-70.

(Docket No. 613) (hereinafter cited as "Sixth Interrogatories at ___, No. __"). However, beyond those issues, Wyoming has confirmed through discovery that since *Nebraska v. Wyoming I* the United States has periodically implemented its own mass allocation of the storage water and natural flow that is inconsistent with the decreed apportionment.

Since 1954, in years when the Bureau predicts that the supply of storage water may be insufficient to meet the full "requirements", it declares an "allocation year" and allots each district a fraction of the total supply proportionate to that district's average use over previous years.⁵ Sixth Interrogatories at 24-27, Nos. 30(h) and

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5. When asked how the Bureau determines the need for allocation, the Bureau responded that an allocation year is declared when "the Bureau determines the supply is not sufficient to meet the requirements of North Platte Project water users." Sixth Interrogatories at 22, No. 30(a). The United States does not explain how it determines what the requirements consist of, but it does acknowledge that requirements must first be determined in order to predict a shortage. The United States has disclaimed any responsibility for assuring that water released or bypassed from the federal reservoirs is beneficially used but has asserted its reliance on the states "to insure that the water delivered from the federal reservoirs on the North Platte for use on lands having contracts for such water *is beneficially used.*" [emphasis added]. Sixth Interrogatories at 37, No. 43. Despite the Bureau's professed reliance on state administration and state law to determine requirements and beneficial use, in the administration of the dry year allocation plan the Bureau neither consults with nor involves state water officials. Sixth Interrogatories at 22, No. 30(b). Nor does the Bureau consider the limits of Paragraph IV of the Decree, the acreage actually being irrigated by any canal or the waste or return flow occurring from the canal. Sixth Interrogatories at 23-27, Nos. 30(d), 30(e), 30(i), and 30(p). Thus while a determination of requirements appears to be essential to identifying a shortage requiring allocation, the Bureau's method for determining the requirements is a mystery.

30(o). That allotment is a total quantity of water, expressed in acre-feet, allotted to individual canals. The allotment for each canal is reduced by the total of all deliveries to that canal, both natural flow and storage. Although in response to Wyoming's interrogatories the Bureau denies that it allocates natural flow, a review of the actual allocation plan obtained from the Bureau shows that by reducing the allocation on a one-for-one basis by the amount of natural flow diversions, natural flow becomes just as much a part of the allocation as storage water. See Sixth Interrogatories at 28, No. 30(s). Therefore, the allocation procedure employed by the Bureau in dry years is purely a mass allocation that sets a cap on the total diversion of each individual canal. That mass allocation is based on neither beneficial use nor any percentage apportionment between the two states. Sixth Interrogatories at 25-27, Nos. 30(i), 30(j) and 30(p). Rather, it is simply based on the amount of water a district has previously diverted.⁶ *Id.*; Sixth

6. Obviously, such an allocation system encourages individual canals to divert as much water as possible during "non-allocation" years in order to maximize their average diversions which will be the measure of their entitlement in a subsequent dry year allocation. That system of administration, when combined with the refusal by Nebraska and the United States to acknowledge or enforce any limit on the individual diversions of the canals, results in the waste of enormous amounts of water that could be conserved in the storage reservoirs to alleviate or avoid the shortage in allocation years. Diversions by the Nebraska canals in the pivotal reach have steadily increased and greatly exceed the requirements as determined by the Court in 1945. Affidavit of Bern S. Hinckley at 7; Wyoming Brief in Support of Second Motion for Summary Judgment (Docket No. 294). Those facts support Wyoming's allegation that the present system of administration is resulting in excessive diversions without regard to actual use or need. The system of delivery of storage water in the pivotal reach is the antithesis of the basic conservation underpinning of the Reclamation Act and directly contravenes the conservation requirements directed in the Reclamation Reform Act of 1982, 43 U.S.C. § 390jj (1988).

Interrogatories at 24, No. 30(h). The allocation plans have changed from year-to-year since the first allocation in 1954. However, in 1989, for example, the Bureau's allocation plan included natural flow, without regard for the carefully crafted 75%/25% apportionment in the North Platte Decree. As a result, in a dry year like 1989 the Bureau's allocation effectively replaces the Court decreed 75/25 apportionment. The Bureau's allocation also includes storage, without regard for the provisions of the contracts which the Court in 1945 explicitly expected to govern the disposition of storage water.

Wyoming's Fourth Cross-Claim questions whether the Bureau's post-decree changes in the way storage water is delivered in the pivotal reach complies with federal law and whether such changes impact the natural flow apportionment. These issues directly affect two classes of water users whom Wyoming represents in this case. The first is the class of users who have contracted for supply from the federal reservoirs, whose storage supply is wasted and whose share of the Wyoming natural flow apportionment is impacted by the Bureau's operations. The second is the class of Wyoming junior appropriators who are subject to the call of the senior rights of the Bureau to refill the federal storage reservoirs in priority.

IV. SUMMARY OF THE ARGUMENT

Wyoming's cross-claims against the United States would hold the United States accountable for its actions that affect the equitable apportionment of the North Platte River. The Court has granted the United States and Nebraska the right to a trial to determine whether

the Decree should be modified to include additional injunctions against Wyoming to protect federal storage projects. Wyoming's cross-claims against the United States simply ask the Court to recognize that there are two sides to the issue of potential injury to the federal storage projects. It is beyond dispute that Wyoming may defend against claims of injury to the federal projects with evidence that unlawful and wasteful operation of those projects is the cause of the injury alleged. Granting leave to file Wyoming's Fourth Cross-Claim, like its First Counterclaim and First Cross-Claim, would allow Wyoming to demonstrate the need for affirmative relief and would provide a jurisdictional basis for such affirmative injunctive relief. If the Court is going to consider modification of the Decree to include new injunctions against Wyoming, the Court should also consider modifications of the Decree to include injunctions against the United States to protect Wyoming's uses of the North Platte.

Nebraska and the United States argue that the issues raised by Wyoming's First and Fourth Cross-Claims were decided in *Nebraska v. Wyoming I* and therefore cannot be reconsidered now for purposes of modifying the Decree. However, whether the Court will consider changed conditions for purposes of modifying the Decree is no longer at issue following the Court's 1993 opinion. Nor is there any question now that operation of the federal storage reservoirs or the use of federal storage water are appropriate subjects for litigation in this Court and in this case. The United States and Nebraska have taken the position that federal reservoirs and the delivery of federal storage water are elements of Nebraska's equitable apportionment that may be injured by proposed new uses of water in Wyoming.

Therefore, they cannot be heard to argue that the Court should refuse to allow Wyoming to show how operation of the federal storage projects injures Wyoming's apportionment.

A predicate of the apportionment of natural flow and the decision not to apportion storage water expressly in the Decree was the assumption that the United States would deliver storage water under existing storage water contracts in accordance with the Reclamation Act and the Warren Act. The Court did not include provisions apportioning storage water in the 1945 Decree because it concluded that storage water in effect was already apportioned in the outstanding contracts between the Bureau and the water users. The United States has not administered storage water according to those laws and contracts and has thereby frustrated the equitable apportionment of natural flow and the overall apportionment of water to lands served by diversions in the pivotal reach. Wyoming's Fourth Cross-Claim would redress the resulting injury to its apportionment.

The Fourth Cross-Claim should be accepted for filing because the Supreme Court is the only court that can resolve the dispute among Wyoming, Nebraska and the United States over the effect of federal storage operations on the equitable apportionment. Wyoming must be able to represent all of its water users as *parens patriae* in this forum. The fact that there is a pending district court action which involves related but more limited private contract issues is no bar to this Court's consideration of the equitable apportionment issues in Wyoming's Fourth Cross-Claim. This Court has original and exclusive jurisdiction over the cross-claims because they implicate the interstate equitable apportionment.

V. ARGUMENT

A. WYOMING'S FOURTH CROSS-CLAIM IS JUSTICIALE IN THIS CASE BECAUSE IT SEEKS TO REDRESS UNLAWFUL AND WASTEFUL BUREAU OPERATIONS THAT DIRECTLY AFFECT THE EQUITABLE APPORTIONMENT

Wyoming's Fourth Cross-Claim alleges, *inter alia*, that the Bureau's operation of the federal projects "(a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary to the provisions of the Decree and contrary to the equitable apportionment, [and] (c) promotes inefficiency and waste of water contrary to federal and state law . . ." The critical undisputed fact, which both Nebraska and the United States overlook is that all upstream water entering the pivotal reach from the mainstem of the North Platte River is controlled by the Bureau's operation of Guernsey Dam.

In 1945 the Court acknowledged the tremendous impact on the water resources of the basin that resulted from the North Platte Project. *Nebraska v. Wyoming*, 325 U.S. at 591-99. The federal reclamation projects were at the heart of the controversy that led to the 1945 apportionment. *Id.* Throughout the course of this case, the United States has been more than a disinterested bystander. It intervened in the case for the purpose of protecting its interest in the federal projects and has actively participated in every aspect of the current proceedings as well as *Nebraska v. Wyoming I*. The various claims Wyoming asserts against the United States, including the Fourth Cross-Claim, must be heard if

there is to be a complete adjudication of the equitable apportionment issues that the Court has already accepted.

1. *The Distribution of Storage Water in Accordance with Federal Reclamation Law and Existing Contracts was an Essential Predicate of the 1945 Equitable Apportionment.*

The United States tries to downplay the importance of storage water in the fashioning of the equitable apportionment by the Court in 1945. U.S. Brief at 20-22. However, on the average, only about one-half of the water available to meet the requirements of the canals diverting in the pivotal reach of the North Platte River is supplied by natural flow; the other half is storage water. Third Interim Report at 62; *Nebraska v. Wyoming*, 325 U.S. at 605. While the Court did not apportion storage water as it did natural flow, it assumed that the Bureau would operate the federal projects in accordance with the applicable law and existing contracts. In effect, the Court concluded that storage water had already been apportioned in the storage water delivery contracts between the Bureau and individual districts. That assumption, dealing with half of the total supply available to meet the requirements for which the Court was apportioning the river, was the linchpin that allowed the Court to determine that the limited percentage apportionment of natural flow only in the Guernsey to Tri-State section would be equitable.⁷

7. The proper administration of storage contracts under federal law is as much a predicate of the apportionment as was the historical operation of the Inland Lakes. In earlier proceedings, the United States argued that the "Inland Lakes winter diversions are a cor-

See Third Interim Report at 69-70; *Nebraska v. Wyoming*, 325 U.S. at 645. In *Nebraska v. Wyoming I*, Special Master Doherty recommended that “[t]he obligation and necessity of performance of these contracts [for storage water] must be recognized by the decree.” Doherty Report at 69. See also *Id.* at 157, 160.⁸

The United States either does not understand the nature of Wyoming’s Fourth Cross-Claim or simply mischaracterizes that cross-claim in an effort to convince the Court to decline to hear it. At times the United States argues that Wyoming is merely seeking to enforce private contract rights; at other times it argues that Wyoming is “invok[ing] the Decree to challenge how the Bureau administers storage water.” U.S. Brief at 24-26, 19. Neither characterization is correct.

Wyoming’s Fourth Cross-Claim asserts that the Bureau’s system-wide operation of the federal projects, which includes the administration of all the storage water contracts as a group, violates various aspects of state and federal law and effectively reapportions nat-

nerstone of the Court’s 1945 scheme. . . .” Response of United States to Wyoming’s Motion for Summary Judgment at 47-49 (Docket No. 83). The Court concluded that storage in the Inland Lakes with a 1904 priority was a “necessary predicate” of the equitable apportionment. *Nebraska v. Wyoming*, 113 S.Ct. at 1697.

8. The Court accepted the definition of storage water proposed by the United States (one that admittedly strayed from the usual definition of storage water), “so as to make the operation of the decree more certain and *to adjust it to the storage water contracts which are outstanding*.” *Nebraska v. Wyoming*, 325 U.S. at 631 (emphasis added). If the Decree was adjusted to the storage contracts, then operations which ignore or violate the storage contracts or release water without regard to need, throw the Decree out of adjustment. That effect on the Decree is the subject of Wyoming’s Fourth Cross-Claim.

ural flow supplies available in the pivotal reach and depletes supplies in Wyoming upstream of the federal reservoirs. Wyoming's Fourth Cross-Claim would address the effect of that operation of the federal projects on the equitable apportionment. It is the effect on the equitable apportionment that makes the issue justiciable in the exclusive original jurisdiction of the Supreme Court.

The United States admits that “[t]he North Platte Decree was carefully crafted to preserve the established system for allocation of storage water . . .” U.S. Brief at 19. Wyoming agrees that the established system of storage allocation was a predicate of the apportionment. The Fourth Cross-Claim asserts that the Bureau has changed that established predicate of the apportionment and, in effect, changed the apportionment to the injury of Wyoming water users. The United States apparently believes that it is free to change the established system of storage water allocation in any way it sees fit and that the affected states should have no recourse before the Supreme Court to question the change or to address the effect of such change on the apportionment.

2. The United States and Nebraska have Introduced the Operation of the Federal Storage Projects as a Central Issue in the Case.

The filing of Wyoming's Fourth Cross-Claim became necessary as a direct result of allegations made by Nebraska as the plaintiff and the United States as an intervenor. Nebraska's original petition alleged injury to its equitable apportionment. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief at 2,

¶ 3 (Docket No. 1). When Wyoming sought summary judgment on the ground that Nebraska had failed to come forward with facts showing injury to the users of natural flow in the apportioned reach, both Nebraska and the United States responded with affidavits intended to show that proposed new development in Wyoming threatened the supply available to the federal reservoirs. Brief for the United States Opposing Exceptions [to the First and Second Interim Report of the Special Master] at 32-33 (August, 1992) (Docket No. 503); Nebraska's Response to Wyoming's, Colorado's, and Basin Electric's Exceptions to the Special Master's First and Second Interim Reports at 85-86 (August 17, 1992) (Docket No. 501). The Court adopted the Special Master's recommendation to deny summary judgment, finding that Nebraska and the United States had raised a genuine issue of material fact as to whether Wyoming's actions would deplete the supply of carryover storage in the federal reservoirs. *Nebraska v. Wyoming*, 113 S.Ct. at 1699-1700. Thus, the focus of Nebraska's and the United States' injury claims was turned to the federal projects and away from natural flow diversions in the pivotal reach.

Nebraska and the United States chastise Wyoming for seeking an apportionment of storage water when in their view the Court has once refused to apportion storage water. Yet they both assert injury to the storage projects as a critical element of their claims of injury to the existing apportionment. Their claims of injury to the storage projects are wholly inconsistent with their argument that storage water was not part of the overall apportionment scheme developed by the Court in 1945.

Since injury to the federal storage projects is an issue in this case, fundamental fairness requires that

Wyoming have an opportunity to show how the Bureau's operation of its reservoirs causes or contributes to the injury alleged. Wyoming's use of such proof in that defensive posture does not appear to be disputed. The filing of Wyoming's First and Fourth Cross-Claims would allow Wyoming to demonstrate the need for affirmative relief to control unlawful and wasteful operation of the federal projects and it would provide a basis for the Court to fashion such relief in the form of new injunctions.⁹

3. *Wyoming's Fourth Cross-Claim is not Precluded by Either the 1945 Opinion or the 1993 Opinion.*

Wyoming does not seek a new equitable apportionment of the North Platte by its Fourth Cross-Claim or by any of its other proposed counterclaims and cross-claims. Wyoming's proposed pleading amendments including its Fourth Cross-Claim, would seek modification of the Decree to define and give effect to the apportionment of waters of the North Platte to Nebraska lands served from diversions in the pivotal reach.

9. The issue is similar to that raised by the Special Master's recommendation to deny Wyoming's First Counterclaim and First Cross-Claim. Wyoming has taken exception to the Special Master's recommendation that the Court foreclose any Wyoming claim for affirmative relief against Nebraska's unlawful and wasteful use of natural flow while considering proof of wasteful use of natural flow only in the context of Wyoming's defense against Nebraska's claims for new restrictions on Wyoming. Wyoming urges the Court not to prematurely circumscribe the scope of relief that it will consider. See Wyoming Brief in Support of Exceptions to the Third Interim Report of the Special Master at 27.

Wyoming's Fourth Cross-Claim does not seek to change the recognized geographic limits of the existing apportionment. See Third Interim Report at 43. Instead, Wyoming alleges that by changing the established system of storage allocation and by violating its contracts and federal law, the Bureau has upset the Court's equitable apportionment of the North Platte.¹⁰ Wyoming seeks modification of the Decree to add injunctions requiring compliance by the United States and its officers with applicable law and contracts so that the apportionment will continue to be equitable and to be administered as the Court intended.

Nebraska and the United States argue that, because the Court declined to restrict the Bureau's operation of the federal reservoirs in the 1945 Decree, the Court is now powerless to consider any relief that would involve restrictions on the Bureau's operations. That argument fails for four reasons.

First, the assumption that the Court refused to control Bureau operation of the reservoirs is wrong. Through injunctions directed to Wyoming, Paragraph IV

10. The Special Master noted that Wyoming's Fourth Cross-Claim bears similarity to Nebraska's Horse Creek claim because both allege an interference with an essential predicate of the apportionment. While the theories on which the two claims are based are similar, the claims are distinguished by the relief they seek. Because there is no apportionment below Tri-State Dam, Nebraska's Horse Creek claim seeks to expand the geographic scope of the apportionment below Tri-State Dam. Such a claim for a new and expanded apportionment Wyoming believes is beyond the scope of this case as defined by the Court's various orders and the 1993 opinion. See Exceptions of the State of Wyoming to the Third Interim Report of the Special Master (November 25, 1994).

of the Decree limits the Bureau, as a Wyoming appropriator, in the amount and timing of storing water in the federal reservoirs. Paragraph XVII of the Decree also expressly limits the use of water released from Glendo Reservoir and Paragraph III expressly defines the relative priorities for filling of the federal reservoirs. In fact, Nebraska and Wyoming each have uncontested, pending amended pleadings that would question the Bureau's Glendo contracts under Paragraph XVII. *See Count II of Nebraska's Motion for Leave to File Amended Petition, ¶ 8 at 7-8 (Injunctive relief is necessary to enforce the Decree and to restrain further violations by the United States) (Docket No. 623). See also Wyoming's Amended Counterclaims and Cross-Claims, ¶ 15 at 6-7 (Docket No. 624).*

Second, the Court's concern in 1945 was to avoid interfering with the Bureau's performance of the outstanding storage contracts under federal law. No one asserted, as Wyoming does now, a need for the Court affirmatively to require the Bureau's compliance with federal law; such compliance was assumed. Thus, the issue that Wyoming's Fourth Cross-Claim would bring was not before the Court in 1945. In *Nebraska v. Wyoming I* the Court proceeded as if storage water was already apportioned by the existing federal storage water delivery contracts. The Court did not apportion storage water, but on the other hand, by providing for the modification of the Decree, the Court did not preclude a formal apportionment of storage water if dictated by changed conditions. Decree Para. XIII; *Nebraska v. Wyoming*, 325 U.S. at 639; Cf. *Nebraska v. Wyoming*, 325 U.S. at 632-633 (The Court recognized that modification of the Decree would be necessary if a different operation of the federal storage reservoirs was subse-

quently allowed by changes to existing contracts and by changes in the existing law.).¹¹

Third, the Court specifically provided in Paragraph XIII(f) of the Decree for consideration of relief at the foot of the Decree upon changed conditions. Wyoming has now alleged changed conditions which include a substantial change in the Bureau's operation of the federal projects that directly affects the apportionment. Surely the Court can consider Wyoming's Cross-Claims for injunctive relief made necessary by changed conditions just as it has agreed to consider Nebraska's claims for new restrictions on Wyoming's use of the Laramie River or the tributaries between Pathfinder and Guernsey. For example, the Court has ruled that its refusal in 1945 to restrict Wyoming's use of the Laramie River does not preclude consideration of Nebraska's claims for modification of the Decree now to impose restrictions on use of the Laramie. *Nebraska v. Wyoming*, 113 S.Ct. at 1698; see also Decree Para. XII(d). Nor should the fact that the Court declined to apportion storage water expressly in the 1945 Decree stand as a bar to Wyoming's Fourth Cross-Claim.

Finally, both Nebraska and the United States mischaracterize the Court's 1993 opinion by suggesting that the Court ruled that beneficial use could not be a limit on use of water apportioned by the Decree. Nebraska Brief at 16-18; U.S. Brief at 9. The Court's 1993 opinion

11. Moreover, the Court went further and expressly noted that it was not deciding the question of whether "the presence of the storage water contracts would preclude an apportionment of storage water." *Nebraska v. Wyoming*, 325 U.S. at 639. The Court merely held that "the equities of the case support the failure to include storage water in the apportionment." *Id.*

held that the present Decree did not impose absolute ceilings on the diversions of the canals in the pivotal reach; it did not preclude consideration of modifying the Decree if Wyoming's proof were to show a need for such additional limitations to protect and to carry out the apportionment. See Wyoming Brief in Support of Exceptions to the Special Master's Third Interim Report at 22-26.¹² To completely ignore beneficial use standards as urged by Nebraska and the United States, the Court would have to conclude that the 1945 Decree and the 1993 opinion intentionally abrogated not only the laws of all three states, which make beneficial use the measure and limit of a water right, but also Section 8 of the Federal Reclamation Act, 43 U.S.C. § 372 (1988), which fixes beneficial use as an overriding limit on rights to water under the federal projects. In other words, while a major thrust of Nebraska's and the United States' arguments against Wyoming's Fourth Cross-Claim is that Bureau operations are a matter of federal law outside the reach of the Court in this case, they also argue that the Court implicitly overruled the beneficial use provisions of federal law. Surely the Court would not have adopted such a radical departure from established law without expressly acknowledging its decision to do so.

12. Nebraska suggests that the Special Master's recommendation to accept Wyoming's Fourth Cross-Claim is inconsistent with his recommendation to deny Wyoming's First Counterclaim and First Cross-Claim. Wyoming has acknowledged that its Fourth Cross-Claim is an extension of the claims of waste and inefficiency contained in its First Counterclaim and First Cross-Claim. If the Court accepts the filing of Wyoming's First Counterclaim and First Cross-Claim as requested in Wyoming's exceptions, Nebraska's objection of inconsistency would be answered and the Court would not have prematurely circumscribed the scope of relief that it might consider upon full development of the facts.

B. IN ITS FOURTH CROSS-CLAIM, WYOMING IS ASSERTING ITS OWN SOVEREIGN INTEREST AS A STATE AND REPRESENTING ITS COLLECTIVE WATER USERS AS PARENTS PATRIAE.

The United States' argument that Wyoming is not the real party in interest in its Fourth Cross-Claim fails for several reasons. U.S. Brief at 24-26. First, the United States' argument misconstrues the nature of Wyoming's claim. As pointed out above, Wyoming does not seek to enforce individual rights under the storage contracts. Wyoming's Fourth Cross-Claim recognizes that there are two classes of storage contracts; those supplying water to irrigation districts that were formed as part of the North Platte Project (the "project districts")¹³ and those disposing of "surplus" water under the Warren Act, 43 U.S.C. § 523 (1988). Wyoming asserts *inter alia* that the Bureau has violated the Warren Act by failing to subordinate Warren Act contracts to the project district contracts as a group. Wyoming also asserts that the Bureau wastes storage water through its operations. Wyoming's Fourth Cross-Claim would address the effect of these actions on the equitable apportionment.

The United States' argument also ignores a substantial body of law recognizing the role of a state in original actions involving the apportionment of interstate streams. It has been well settled since the turn of the century that individual rights to a supply of water from an interstate stream collectively may be represented by

13. The North Platte Project Districts are: Goshen Irrigation District in Wyoming and Pathfinder, Gering-Fort Laramie and Northport Irrigation Districts in Nebraska.

the state as *parens patriae*. *Kansas v. Colorado*, 185 U.S. 125, 142-43 (1902) and 206 U.S. 46, 99-100 (1907); *Wyoming v. Colorado*, 286 U.S. 494, 508 (1932); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945); *New Jersey v. New York*, 345 U.S. 369, 372-74 (1953); *United States v. Nevada*, 411 U.S. 534, 539 (1973).

The United States suggests that Wyoming's "sovereign interest, however, is minimal insofar as Wyoming has no direct interest in the storage water apart from the interest of a particular class of Wyoming water users who have water contracts." U.S. Brief at 24. The assumption that Wyoming is looking out only for a limited class of water users is wrong. In fact, Wyoming represents all of its users who depend on the interstate equitable apportionment of the North Platte River and seeks to redress the effect on that apportionment of the Bureau's administration of the federal projects. Moreover, the United States' argument that a state cannot appear in this Court to represent the interests of individual water users would apply equally to users of natural flow and would fly directly in the face of the *parens patriae* cases cited above.

The United States also argues that, unless the Court denies Wyoming leave to file its Fourth Cross-Claim, Wyoming's standing to bring the claim will "likely become a matter of litigation" later in this case. United States Brief at 25. However, the standing issue is now before the Court, having been raised at this stage by the United States. The Court necessarily will resolve the issue in deciding whether to accept Wyoming's filing. That decision will be "subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming v.*

Oklahoma, 112 S.Ct. 789, 796 (1992). There is no reason now to fear that there would be a need to relitigate the standing issue later in this case.¹⁴

Finally, the United States argues that the Court should not accept Wyoming's Fourth Cross-Claim because the individual irrigation districts with storage contracts might move to intervene in this case. Enforcement of the water storage contracts is not the central issue in Wyoming's Fourth Cross-Claim. At best the contract interpretation issues are ancillary to the equitable apportionment issue. Moreover, there is ample precedent in this case and in the *parens patriae* cases cited above to support the conclusion that individual water users would be adequately represented by the respective states. See *Nebraska v. Wyoming*, 295 U.S. at 43 (the Bureau as well as any Wyoming irrigation district or private appropriator will be bound by an adjudication of Wyoming's rights); See also *New Jersey v. New York*, 345 U.S. 369 (1953) (denying the City of Philadelphia leave to intervene in a suit involving apportionment of the Delaware River on the ground that the State of Pennsylvania adequately represented the City as *parens patriae*).

In summary, Wyoming is entitled to seek protection of its equitable apportionment from interference by the

14. The United States' position on Wyoming's standing is particularly curious in light of the position the United States took with respect to the federal district court suit involving the Inland Lakes that was pending at the time Nebraska's petition was filed in this case. The United States argued that the federal district court suit could not resolve issues related to the equitable apportionment because Nebraska was not a party. See Response of United States to Wyoming's Motion for Summary Judgment at 48-49 (Docket No. 83); First Interim Report of the Special Master at 19-20.

unlawful and wasteful operation and administration of the federal water storage projects. In pursuit of that relief Wyoming can represent its water users as *parens patriae* even with respect to ancillary contract interpretation issues that may arise.

C. THIS IS THE ONLY FORUM IN WHICH TO LITIGATE ISSUES CONCERNING THE EQUITABLE APPORTIONMENT OF THE NORTH PLATTE, INCLUDING RELATED QUESTIONS ABOUT THE BUREAU OF RECLAMATION'S COMPLIANCE WITH FEDERAL LAW.

The United States argues that the issues in Wyoming's Fourth Cross-Claim are raised in a pending suit between the North Platte Project districts and the Bureau of Reclamation. *Goshen Irrigation District v. United States*, No. C89-0161J (D. Wyo., complaint filed June 23, 1989). Goshen Irrigation District is one of four irrigation districts formed under the Reclamation Act as part of the North Platte Project. That suit involves a private dispute over the manner in which the Bureau administered Goshen Irrigation District's storage water contracts in 1989 *vis-a-vis* the Bureau's contracts with nine other irrigation districts in Wyoming and Nebraska under the Warren Act, 43 U.S.C. § 523 (1988). The Warren Act provides for the sale of surplus storage water from federal reclamation projects to non-project districts. Goshen Irrigation District claims that in 1989 the Bureau did not differentiate between it, as a North Platte Project contractor, and Warren Act contractors to supply only surplus water to the latter.

The Goshen Irrigation District suit involves questions raised by one North Platte Project irrigation district over the 1989 version of the Bureau's allocation plans. If anything that suit was the portent of a bigger problem that prompted Wyoming to consider more carefully the Bureau's operation of its storage water delivery contracts. A review of the facts of that case has convinced Wyoming that the Bureau is guilty of wide scale violations of law and the contracts that underlie the equitable apportionment. Although prompted by Goshen Irrigation District's suit, Wyoming's claims go far beyond the claims of one irrigation district over one year's activities by the Bureau. Wyoming's Fourth Cross-Claim extends over the Bureau's systematic disregard of the law, of the terms of its storage water delivery contracts and of this Court's trust that those laws and contracts would be followed.

The United States correctly notes that the irrigation districts are before the federal district court to construe their contracts with the United States and that neither Wyoming nor Nebraska have standing to participate as parties in that action. Moreover, despite its attempts to have that case dismissed on the grounds of sovereign immunity,¹⁵ the United States correctly states that

15. See Third Interim Report at 71 n.173. The idea that the Bureau's decisions are easily reviewed in federal district court is inaccurate. The time and expense of litigation against the Bureau is already a deterrent that prevents individual irrigation districts from questioning Bureau decisions no matter how arbitrary and capricious they may be. The time and expense of litigation against the Bureau is further increased when the United States files motions to dismiss that it must now admit to this Court are of questionable legal merit. U.S. Brief at 29-30 n.16. The United States has asserted immunity as a matter of course in other federal district

Bureau contracts can be construed in federal district court. If indeed there were no interstate equitable apportionment involved and if the North Platte Project did not occupy a central place in that apportionment both geographically and legally, then the federal district court may provide an adequate alternative forum to resolve the remaining contract enforcement issue. However, as the Special Master correctly points out, the federal district court lacks jurisdiction to resolve a controversy between states and therefore this Court is the

court cases involving the operation of federal reclamation projects in the North Platte system. In *State of Wyoming and Goshen Irrigation District v. United States*, No. C89-0286J (D. Wyo., complaint filed October 6, 1989), the State and one of the project districts challenged the Bureau's policy concerning borrowing of water between projects. There the United States has pending but not decided a motion to dismiss based on the United States' claims that it is immune from such suits brought by Wyoming. As with *Goshen Irrigation District v. United States*, No. C89-0161J (D. Wyo., complaint filed June 23, 1989), the District Court has effectively stayed proceedings and taken no action since February 23, 1993. In the Inland Lakes case, *Christopoulos v. United States*, No. C86-0370B (D. Wyo. complaint dismissed without prejudice August 31, 1990), before the Special Master assumed jurisdiction over that dispute in this case, the United States had unsuccessfully moved to dismiss on grounds of sovereign immunity. See Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion at Appendix A-45 to A-50 (U.S. District Court Order staying proceedings) (Docket No. 23). The United States has also denied the authority of Wyoming state water officials over the United States as a water appropriator under state law. United States Response to Wyoming's Sixth Set of Interrogatories at 45-48, No. 58 (Docket No. 613). While the United States must now acknowledge that other federal courts have rejected its sovereign immunity claims, U.S. Brief at 29-30 n.16, its actions speak louder than words. In effect, the United States does not believe any forum is adequate or necessary to review the Bureau's actions. In this case, the United States would like to enjoy full party status to protect storage use as part of the apportionment while remaining completely unaccountable for its actions that affect the equitable apportionment.

only appropriate forum for the issues raised in Wyoming's Fourth Cross-Claim. Third Interim Report at 70-71. Furthermore, because the Goshen Irrigation District suit does not involve all of the contractors below Guernsey Dam, a decision in that case would be confined to the precise issues raised concerning the operation of Goshen Irrigation District's contract with the Bureau in 1989.

Wyoming did not bring claims against the United States until now because, until the Court's 1993 decision on motions for summary judgment, the United States had not identified the specific federal interests at stake in these proceedings.¹⁶ However, by focusing their claims of injury on potential injury to the federal projects, the United States and Nebraska have acknowledged that the delivery of federal storage water and the operation of federal projects are part of the equitable apportionment of the North Platte. Wyoming does not disagree with that characterization of the federal projects. Wyoming's First and Fourth Cross-Claims are founded on the premise that the operation of the federal projects can not be viewed in isolation without regard to the equitable apportionment.

In addition, the issues raised by Wyoming's Fourth Cross-Claim are broader than those raised by the parties in *Goshen Irrigation District v. United States*. In *Goshen*, the parties are not interested in the broader

16. In Wyoming's initial Answer and Motion for Leave to File Counterclaims, Wyoming was unaware of any claims of the United States or Colorado, but specifically reserved the "right to assert claims against those parties after their status and position have been disclosed." Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8 (Docket No. 5).

implications of the Bureau's operations on the equitable apportionment or on other appropriators in Wyoming; they are only concerned with their own proprietary and contractual interests. Wyoming has pointed out that the Bureau's administration of the storage projects affects both the apportionment of natural flow in the pivotal reach as well as the availability of water for uses upstream of the federal reservoirs. Wyoming must be able to represent all its users of North Platte River water and can do so only in this case. As pointed out above, not even all of the Wyoming storage contractors are participating in the *Goshen* Irrigation District suit. The fact that Wyoming may share some of the same concerns as the plaintiffs in *Goshen*, does not diminish the need to address the broader apportionment issues in the context of this case where Nebraska, Wyoming and the United States are already before the Court. Judicial economy is served by litigating Wyoming's Fourth Cross-Claim together with Nebraska's and the United States' claims of injury to the federal projects in this forum even if the resolution of those issues may obviate a decision in *Goshen*.¹⁷

Contrary to the United States' argument, *United States v. Nevada*, 412 U.S. 534 (1973) and *California v. Nevada*, 447 U.S. 125 (1980) do not control the issue now before the Court. Brief of the United States in Support of Exception at 16-17. Those cases involved the question of whether to exercise the Court's original, but not exclusive, jurisdiction over disputes between the United

17. The District Court has taken no substantive action in *Goshen* since the case was submitted for ruling nearly four years ago. The Court has been kept advised of developments in this case and appears to have stayed consideration of the *Goshen* case pending the outcome of proceedings here.

States and a state under 28 U.S.C. § 1251(b)(2) (1988). In each of those cases the Court specifically noted that the issues involving the United States did not also involve any dispute between the states and therefore did not require the exercise of the Court's exclusive original jurisdiction under 28 U.S.C. § 1251(a) (1988). This case is more like *Arizona v. California*, 373 U.S. 546 (1963), *decree entered* 326 U.S. 340 (1964) involving a dispute between states in which the United States intervened and became subject to injunctions in the final decree. Here, the United States is already before the Court, having intervened to litigate issues concerning the operation of its projects. The effect of the Bureau's storage operations on the interstate equitable apportionment is a matter of dispute between the states and lies in the Supreme Court's original jurisdiction under 28 U.S.C. § 1251(a) (1988).

VI. CONCLUSION

For the foregoing reasons the Court should overrule the exceptions of Nebraska and the United States and grant Wyoming leave to file its Fourth Cross-Claim against the United States.

Respectfully submitted,

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